

***United States Court of Appeals  
for the Second Circuit***



**PETITIONER'S  
BRIEF**



B

75-2018

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----x

UNITED STATES OF AMERICA ex rel.	:	
DONALD WILLIAMS,	:	
Appellant,	:	
-against-	:	No. 75-2018
JEROME PATTERSON, Warden, Eastern	:	
Correctional Facility, Napanoch, N.Y.	:	
Appellee.	:	

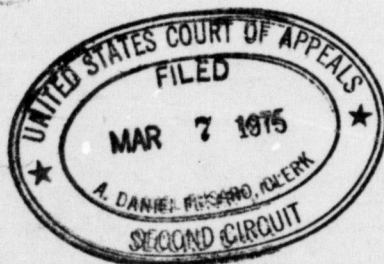
-----x

PETITIONER'S BRIEF

JAMES F. GILL, ESQ.  
Attorney for Petitioner  
230 Park Avenue  
New York, New York 10017

Of Counsel:

James F. Gill  
Peter O'Connell



ROBINSON, SILVERMAN, PEARCE, ARONSOHN, SAND & BERMAN  
230 PARK AVENUE  
NEW YORK, N.Y. 10017

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----x

UNITED STATES OF AMERICA ex rel.	:	
DONALD WILLIAMS,	:	
	:	
Appellant,	:	
	:	
-against-	:	
	:	No. 75-2018
JEROME PATTERSON, Warden, Eastern	:	
Correctional Facility, Napanoch, N.Y.,	:	
	:	
Appellee.	:	

-----x

PRELIMINARY STATEMENT

This memorandum of law is submitted on behalf of the petitioner, Donald Williams, in support of an appeal from the decision of the Honorable Charles H. Tenney of the District Court, Southern District of New York, dated December 10, 1974.

STATEMENT OF FACTS

The petitioner was arrested on September 28, 1971 and was indicted on counts of burglary in the third degree, petit larceny, and possession of burglar's tools. He was represented at his arraignment by the Legal Aid Society (Legal



Aid). On November 17, 1971, Legal Aid was removed at petitioner's request and Allen S. Stim was assigned to represent petitioner. Petitioner alleges that from the outset Mr. Stim failed to take an active role in the presentation of his defense because petitioner refused to accept a plea which was arranged by Legal Aid.

While Mr. Stim represented petitioner at a Huntley hearing held on January 20 through January 26, 1972, it was the petitioner who made the application in connection therewith. The record indicates that petitioner submitted arguments at this hearing based upon a brief which he prepared and researched himself. After the Huntley Hearing and before the commencement of his trial, petitioner made application on four separate occasions to have Mr. Stim removed as his counsel.

On April 3, 1972, petitioner's case came on for trial before Justice Joseph A. Martinis and a petit jury in Part 44 of the New York State Supreme Court. At the beginning of the trial, Mr. Stim advised the court that petitioner was representing himself and that the "last judge" told Stim to sit in court and give petitioner legal advice if requested. Petitioner advised the court that it was not his choice to represent himself and that he felt he needed the assistance of counsel. He further told the court that

he did not trust and lacked confidence in Mr. Stim. The court did not conduct an inquiry into the reasons behind petitioner's dissatisfaction with Mr. Stim, but gave petitioner the option of proceeding with Mr. Stim's assistance or in propria persona. Under protest, petitioner elected to represent himself.

Throughout the trial, petitioner conducted his own defense. On two occasions, Mr. Stim, who was directed by the court to remain in the "audience", rendered assistance. On one occasion, Mr. Stim, after much prodding, prepared a subpoena ducas tecum to obtain petitioner's records from the Tombs. Later, Mr. Stim submitted a set of charges to be considered by the judge. Petitioner was found guilty of burglary in the third degree and was sentenced to a term of not less than two years and four months to not more than seven years. He is now serving his term in Clinton Correctional Facility in Dannemora, New York.

On May 22, 1973, the Appellate Division, First Department, of the State of New York affirmed petitioner's conviction and leave to appeal to the Court of Appeals was denied. Petitioner thereafter filed a writ of habeas corpus and the decision of Judge Tenney in connection therewith was entered on December 10, 1974. Judge Tenney did not conduct an evidentiary hearing before rendering his decision.



## ISSUES

I. Did petitioner have an "irreconcilable conflict" with his appointed counsel sufficient to entitle him to have different counsel assigned to represent him? The District Court concluded that petitioner did not have such an "irreconcilable conflict" with his assigned counsel. (Tenney, J., p.10)

II. Did petitioner effectively waive his right to counsel? The District Court concluded that petitioner waived this Constitutional right (Tenney, J., p.3).

## ARGUMENT

### POINT I

Petitioner had an "irreconcilable conflict" with his assigned counsel sufficient to cause the removal of this assigned counsel

It was argued before the District Court that petitioner was denied the effective assistance of counsel which is guaranteed under the Sixth and Fourteenth Amendments. Petitioner urged that this right was violated because the trial court refused to inquire into the reasons behind his dissatisfaction with counsel. The District Court found that the trial court was not obligated to conduct this inquiry and that, in any event, petitioner did not have an irreconcilable conflict with his counsel.

It is submitted herein that the trial court had an affirmative duty to inquire into the reasons behind petitioner's dissatisfaction with counsel. It is further submitted that the District Court abused its discretion in failing to conduct an evidentiary hearing on this issue and that, had the facts been fully developed, the court would have found an "irreconcilable conflict" sufficient to necessitate the removal of petitioner's assigned counsel.

#### DUTY TO INQUIRE

It is undisputed that the trial court failed to inquire into the reasons behind petitioner's dissatisfaction with his assigned counsel. Relying upon United States v. Calabro, 467 F.2d 973 (2d Cir., 1972) the District Court ruled that it was not necessary for the trial court to conduct this inquiry. Calabro stands for the proposition that a defendant must show good cause in order to have different counsel appointed at trial. That this is the law is beyond question. However, Calabro does not relieve the trial court of its duty to conduct an inquiry. The defendant in Calabro was afforded an adequate opportunity to explain the reasons behind his dissatisfaction with counsel. The court stated, on page 987:



"In this case, the first sign of dissatisfaction came during trial, evolved around an issue of trial strategy which was easily resolved, and was probed by the court, conscious of the inevitable delay a switch would entail." [Emphasis Supplied]

At p. 986, the Court wrote:

"If a court refuses to inquire into a seemingly substantial complaint about counsel, when he has no reason to suspect the bona fides of the defendant, or if on discovering justifiable dissatisfaction a court refuses to replace the attorney, the defendant may then properly claim denial of his Sixth Amendment right;"

Here, petitioner presented a "seemingly substantial complaint". He advised the trial court that he did not trust and lacked confidence in his counsel. Yet, the District Court below would require petitioner to go further. It would require petitioner to come forward with hard evidentiary facts to substantiate his feeling of concern. To thrust such a burden upon a defendant is to wrongfully presume that he is acquainted with the intricacies of the law. To a lay-defendant, the "fact" that he did not trust his lawyer is a strong reason for him to request the lawyer's removal. To a court this is not fact but opinion.

It is for these reasons that the burden should be placed upon the trial judge to draw the reasons for the

defendant's dissatisfaction with counsel out into the open. As stated by Chief Justice Burger in Brown v. United States, 264 F.2d 363, 369 (D.C., 1959):

"If the reasons are made known to the court, the court may rule without more. If no reasons are stated, the court then has a duty to inquire into the basis for the client's objection to counsel and should withhold a ruling until the reasons are made known."

It is well established that the failure of the trial court to conduct an inquiry in the instant case violated petitioner's Sixth Amendment rights. See United States v. Morrissey, 461 F.2d 666 (2d Cir., 1972); United States v. Calabro, *supra*; Brown v. Craven, 424 F.2d 1166 (9th Cir., 1970); United States v. Alberti, 470 F.2d 878 (2d Cir., 1973); Soto v. United States 369 F.Supp 232 (E.D. Pa., 1963); United States v. Young, 482 F.2d 993 (5th Cir., 1973).

The trial court had no justifiable cause to suspect petitioner's bona fides. While the court should be mindful of the possibility that a defendant may be attempting to delay the execution of justice, it may not conclude that a defendant is engaging in dilatory tactics upon a mere suspicion. As stated in United States v. McMann, 252 F.Supp. 539, 545 (N.D.N.Y., 1966):

"Suspicion is not enough even though based upon good intuitive experience, and is a weak basis upon which to curtail or forfeit basic constitutional rights."



### EVIDENTIARY HEARING

Not only did the District Court find that the trial court had no duty to inquire into the reasons behind petitioner's dissatisfaction with counsel but further found that petitioner's claims in this regard were groundless. The District Court arrived at this conclusion without the aid of an evidentiary hearing.

Evidentiary hearings are covered by 28 USC §2254(d). When the state court does not resolve the merits of a factual dispute, the District Court must hold an evidentiary hearing; Townsend v. Sain, 372 US 293, 313 (1963); United States v. Reincke, 383 F.2d 129 (2d Cir., 1967). The relevant factual issues herein were never even examined, say nothing of resolved by the State court.

The District Court's reliance upon Giacolone v. Lucas, 445 F.2d 1238 (6th Cir., 1971), cert den. 405 U.S. 992 (1972); and Sawyer v. Craven, 325 F.Supp. 526 (C.D. Cal., 1971) is misplaced. The issue before the court in both of these cases dealt with the lawfulness of a search. In both cases, exhaustive hearings were held in the State Court during which witnesses were examined and cross-examined and all of the material facts were fully developed. The relevant material

facts in the present case deal with the reasons behind petitioner's dissatisfaction with his assigned counsel. Petitioner duly advised the trial court that he did not trust and lacked confidence in his assigned counsel. The trial court went no further. It ordered petitioner to proceed with Mr. Stim's assistance or in propria persona. Unlike Giacolone and Sawyer, no record was developed in the State Court for the District Court to examine in order to determine if the trial court acted properly in ordering petitioner to proceed.

Accordingly, it was necessary for the District Court to afford the petitioner a hearing with respect to this question. The District Court could only infer from the record before it that petitioner's dissatisfaction with counsel was more imagined than real.

The trial court deprived petitioner of an opportunity to let the reasons behind his dissatisfaction with counsel be known. By denying petitioner an evidentiary hearing, the District Court compounded this injustice. Petitioner should be allowed at least one day in court where the reasons behind his dissatisfaction with his appointed counsel can be fully aired and evaluated.



### IRRECONCILABLE CONFLICT

The District Court erred in finding no "irreconcilable conflict" on the basis of the record before it. In his Petition for a Writ of Habeas Corpus, petitioner stated that his assigned counsel did nothing to assist him in the preparation of his defense. It is such a lack of communication between a defendant and his counsel that caused a Writ of Habeas Corpus to issue in Brown v. Craven, 424 F.2d 1166 (9th Cir., 1970). The fact that petitioner sought to have his counsel removed on four separate occasions prior to trial clearly indicates that the conflict was deep and long standing.

The District Court, however, chose not to believe petitioner. Rather, it concluded from the perfunctory services rendered by Mr. Stim at a Huntley Hearing before trial and at presentencing motions after trial that the conflict lacked substance.

Such a conclusion is belied by the record. Although Mr. Stim appeared at a Huntley Hearing on petitioner's behalf, the arguments made during the hearing on behalf of petitioner were prepared and researched by petitioner. It was petitioner who arranged the hearing, not Mr. Stim. As for the presentencing motions, Mr. Stim attended only after petitioner sent two letters to the Appellate Division demanding Stim's presence.

The District Court drew an analogy between the present case and United States v. Morrissey, 461 F.2d 666 (2d Cir., 1972). The defendant in Morrissey, like the petitioner, maintained throughout the trial that he rejected his counsel. In Morrissey, however, the defendant sought the assistance of his appointed counsel twelve times during the course of the trial and consulted with him during a four-day recess in the trial.

Here, petitioner never consulted with Mr. Stim about the trial. The only discussions that transpired between the two outside of court dealt with their conflict and not with the trial itself. On only two occasions during the trial did Mr. Stim render assistance to petitioner. On one occasion Mr. Stim prepared a subpoena duces tecum for petitioner. Later, Mr. Stim submitted a list of charges to the judge for consideration. In the first incident, Mr. Stim was directed by the judge to prepare the subpoena. In the second incident, it is unclear whether petitioner requested Mr. Stim to submit the charges to the judge.

The services performed by Mr. Stim were not sufficient to warrant a finding that an irreconcilable conflict did not exist between petitioner and Mr. Stim. The services rendered by Mr. Stim fall far short of the type and quality of services that petitioner was entitled to from his appointed



counsel; Etsinger v. State of Iowa, 386 US 748 (1967); Harper v. Wainwright, 334 FS 1338 (M.D. Fla., 1971); Brown v. Craven 424 F2d 1166 (9th Cir., 1970).

## POINT II

### Petitioner Did Not Waive His Right to Counsel

Petitioner argued before the District Court that his constitutional rights were violated in that the trial court did not properly advise petitioner that it was unwise for a defendant to proceed without counsel. The District Court found that it was not necessary for the trial court to render this advice and that petitioner fully realized the consequences of his actions and knowingly waived his right to counsel. The District Court based this finding upon the following colloquy between petitioner and the trial judge:

[petitioner] "I am not confident. I know little or no law at all. I am a layman. I am not familiar with the mechanics of legal procedure so that if I do be forced to represent myself, the trial would be merely a miscarriage of justice because I am not familiar with the legal procedures."

At the time petitioner made this statement, he was not focusing upon the pitfalls of self-representation. He only wanted his assigned counsel to be replaced by someone

that he could trust. In substance, the defendant was saying "Mr. Stim is totally unacceptable to me and I'm incapable of defending myself". This statement relied upon by the District Court constituted no waiver at all. In United States v. Mitchell, 354 F.2d 767, 768 (2d Cir., 1966) there was a specific waiver of counsel and yet the court found that it was ineffectual:

"Did appellant waive his right to counsel on September 13? We think not. He did say in answer to a direct question by the trial judge as to whether he wished to waive his right to counsel 'yes. you leave me no alternative.' This, we think, amounted to no more than to say 'yes, because you compel me to do so.'"

It was improper for the Court below to infer a waiver on the basis of the petitioner's statement set forth above. The right to counsel is a fundamental constitutional right and a waiver of this right must be clear and unequivocal. The courts must indulge every presumption against its waiver; Johnson v. Zerbst, 304 US 458 (1938). Accordingly, for a waiver of counsel to be effective, the court must consider:

"Whether there has been a full and calm discussion between the judge and defendant, whether the defendant understood that he had a choice between proceeding pro se and with assigned counsel, whether the defendant understood the advantages of having one trained in the law to represent him, and whether the defendant had the capacity to make an intelligent choice;" United States v. Spencer, 439 F.2d 1047, 1050 (2d Cir., 1971).



In United States v. Harrison, 451 F.2d 1013 (2d Cir., 1971) the trial court failed to discuss the disadvantages of self-representation to an attorney. It would be an injustice to hold that the trial court was not required to warn petitioner, an indigent lay-defendant, of the consequences of his actions whereas a member of the bar is entitled to such a warning.

For the foregoing reasons, it is respectfully urged that a writ of habeas corpus issue on the grounds that petitioner was denied the effective assistance of counsel. In the alternative, it is urged that the case be remanded to the District Court for an evidentiary hearing so that the reasons behind petitioner's dissatisfaction with counsel may be fully aired and evaluated.

Respectfully submitted,

James F. Gill  
Attorney for Petitioner

Of Counsel:

James F. Gill  
Peter B. O'Connell





